...PREME COURT

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1260

LOUIS POMPONIO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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OCTOBER TERM, 1974

No.

LOUIS POMPONIO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Louis J. Pomponio, Jr.,[1] respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 7, 1975.

OPINIONS BELOW

The Opinion of the Court below is not yet reported. It is set out in Appendix I, pp. 1a-7a, *infra*. The Court's Judgment is set out in Appendix II, p. 8a, *infra;* and its Order denying the Petition for Rehearing and Sug-

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[1] In the District Court, the case was styled with Petitioner's correct name, Louis J. Pomponio, Jr. Inexplicably, in the Court below the name of Petitioner, and thus the caption, was changed to Louis Pomponio.

gestion for Rehearing En Banc, in Appendix III, p. 8a, *infra*. The opinion of the District Court granting the arrest of judgment was rendered orally and is not reported; the report thereof is set out in Appendix IV, pp. 9a-10a, *infra*.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered on February 7, 1975. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 4, 1975, and this Petition for a Writ of Certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May the term "bribery" as used in the Travel Act, 18 U.S.C. § 1952, be expanded to include "commercial bribery" and thus reach out to payments made to private persons, as the Court below held, or is it confined to payments made to public officials only, as other Federal Courts have held and as this Court stated in *United States* v. *Nardello,* 393 U.S. 286 (1969)?

2. May the Travel Act, 18 U.S.C. § 1952, be used to extend 18 U.S.C. § 215 to those persons *making* payments to bank officials when that statute by its terms is expressly limited to bank officials who *receive* such payments?

STATUTORY PROVISIONS INVOLVED

The Travel Act, 75 Stat. 498, 18 U.S.C. § 1952, as amended, provides as follows:

§ 1952. Interstate and foreign travel or transportation aid in racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations or violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

* * * * *

Pertinent portions of the New York Penal Law provide as follows:

§ 180.00 Commercial bribing

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to in-

fluence his conduct in relation to his employer's or principal's affairs.

Commercial bribing is a class B misdemeanor.

* * *

§ 200.00 Bribery

A person is guilty of bribery when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

Bribery is a class D felony.

* * *

§ 70.15 Sentences of imprisonment for misdemeanors and violation

* * *

2. Class B misdemeanor. A sentence of imprisonment for a class B misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed three months.

* * *

§ 70.00 Indeterminate sentence of imprisonment for felony

* * *

2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:

* * *

(d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years. . . .

* * * * *

18 U.S.C., § 215, 62 Stat. 695, as amended, provides as follows:

§ 215. Receipt of commissions or gifts for procuring loans

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

STATEMENT OF THE CASE

The Indictment in this case, found deficient by the District Court and adequate by the Court of Appeals, was returned by a Grand Jury in the United States District Court for the Eastern District of Virginia on September 24, 1973. It accused Petitioner, together with his brothers Peter and Paul Pomponio and their attorney, Charles J. Piluso, of violating and conspiring to violate the Travel Act, 18 U.S.C. § 1952. Describing the Pomponio brothers as builders, owners and operators of high-rise buildings in Northern Virginia and the District of Columbia, the Indictment contains not the slightest suggestion that they were engaged in anything other than a legitimate business; there are no allegations or even intimations that there are organized crime overtones in this case. The Indictment describes Sidney M. Zneimer as a Vice President of the Royal Na-

tional Bank of New York who had responsibility for reviewing Pomponio requests for construction loans, for arranging the participation of other lending organizations in such loans and, in general, administering those construction loans after they were made. While the Indictment which was issued contained nine counts, the Government proceeded to trial only on the conspiracy count and two substantive counts. In essence, the Indictment charged that commencing on or about September 1, 1967 the Petitioner, his two brothers and his attorney conspired with each other and with Zneimer (who was named as an unindicted co-conspirator) to violate the Travel Act, in order to carry on the unlawful activity of "commercial bribery", in violation of New York Penal Law § 180, set out at pages 3-4, *supra*, and also 18 U.S.C. § 215, set out at pages 4-5, *supra*—by giving Zneimer various sums of money and things of value.[2]

On the ground that the plain language of the statute as well as legal authority and legislative intention demonstrated that "*commercial* bribery" was *not* encompassed within the term "bribery" as it appeared in the Travel Act, Defendants filed a pretrial Motion to Dismiss the Indictment for Failing to State Crimes. District Judge Oren R. Lewis never formally ruled on this Motion, but denied it as a practical matter by scheduling the trial to commence on March 25, 1974. The case proceeded at that time as to the other Defendants; Petitioner was severed because of illness. That trial re-

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[2] Count I, the conspiracy Count, refers to the unlawful activity as "commercial bribery", whereas Counts V and IX, the substantive Counts, as "bribery." App. V, which sets out the pertinent portions of the Indictment, pp. 10a-15a, *infra*.

sulted in the conviction of Charles J. Piluso and acquittal of the other two Defendants.[3]

When Petitioner recovered from his illness, he was tried before District Judge Albert V. Bryan, Jr.; and on April 26, 1974 was found guilty by the jury on all three Counts. On May 17, 1974, pursuant to Rule 34, Federal Rules of Criminal Procedure, Judge Bryan arrested the judgment. He held the Counts in the Indictment did not charge an offense "because the unlawful activity referred to in the indictment as being promoted or furthered by the Defendant, Louis J. Pomponio, Jr., namely Section 215 of Title 18 of the U.S. Code and the New York Penal Code, in my view did not come within the unlawful activity definition of Section 1952 of Title 18." App. IV, p. 9a, *infra*.

The Government appealed from this decision and the Court below reversed Judge Bryan's ruling. "Concededly," the Court stated, "the crime of bribery was originally limited to cases involving the corruption of those in the public service, and some statements of the limited legislative history of the Act might appear to support the position of the defendants." App. I, p. 5a, *infra* (footnotes omitted throughout). Nevertheless, the Court rejected Petitioner's contention that the concept of "bribery" as used in the Travel Act did not include commercial bribery, because both State and Federal statutes "have also extended the concept of bribery into areas of private conduct which we think appropriately fall within the ambit of the Travel

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[3] Piluso's conviction was affirmed in the Court below in the same opinion that reversed the District Court Order arresting judgment in Petitioner's case; and a separate Petition for Certiorari to review his conviction is being filed.

Act." *Ibid.* Purporting to rely upon the decision of this Court in *United States* v. *Nardello,* 393 U.S. 286 (1969) (*"Nardello"*), the Court below held that the acts alleged in the Indictment fell within the generic term "bribery" as used in the Travel Act.

The Court failed to decide the issues raised by the Government's reliance upon 18 U.S.C. § 215—whether it was a "bribery" statute altogether and how it could be applied against a payor, when it in terms referred solely to "receipt"—with the assertion that the reference thereto in the Indictment served "only as a background identification of the unlawful activities." App. I at p. 7a, *infra.*

REASONS FOR GRANTING THE WRIT

As this Court well knows, the Travel Act is a statute with such broad, imprecise and ambiguous language that it generates legal problems and difficulties for all participants in the administration of the criminal law, prosecutors, defendants and Federal courts;[4] including this Court.[5]

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[4] E.g., *United States* v. *Lightfoot,* 506 F.2d 238 (D.C. Cir. 1974); *United States* v. *Brown,* 505 F.2d 261 (4th Cir. 1974); *United States* v. *Zemater,* 501 F.2d 540 (7th Cir. 1974); *United States* v. *Isaacs,* 493 F.2d 1124, 1146-1149 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974); *United States* v. *Archer,* 486 F.2d 670 (2nd Cir. 1973); *United States* v. *Altobella,* 442 F.2d 310 (7th Cir. 1971); *United States* v. *Botticello,* 422 F.2d 832 (2nd Cir. 1970); *United States* v. *Hawthorne,* 356 F.2d 740 (4th Cir.), *cert. denied,* 384 U.S. 908 (1966); *Marshall* v. *United States,* 355 F.2d 999 (9th Cir.), *cert. denied,* 385 U.S. 815 (1966); *United States* v. *Anderson,* 368 F. Supp. 1253 (D. Md. 1973); *United States* v. *Machi,* 352 F. Supp. 1173 (E.D. Wisc. 1972).

[5] E.g., *Erlenbaugh* v. *United States,* 409 U.S. 239 (1972); *Rewis* v. *United States,* 401 U.S. 808 (1971) (*"Rewis"*); *Nardello.*

This case presents a new and an unprecedented expansion of the Travel Act beyond both its language and its history. There is deep doubt that the commercial bribery alleged in the Indictment can be brought within the unlawful activity of "bribery" specified in the Travel Act. Likewise, serious questions are raised by the charge that the *making of payments* to a loan officer of a federally insured bank can create a crime under the Travel Act when, in 18 U.S.C. § 215—the statute upon which this phase of the Indictment is based—Congress specified that only the *"receipt" of such payments* should be the crime and in any event did not regard the crime as "bribery." Consideration and decision of these questions by this Court are essential, not only to rectify a miscarriage of justice, but also to resolve the evident conflict between the decision below and other decisions, the obvious misreading of this Court's decisions, and the impermissible warping and stretching of the Travel Act. This case is an especially appropriate vehicle for the resolution of these issues, since they are presented in the uncluttered context of a Motion to Arrest the Judgment of Conviction.

I.

THE FEDERAL COURT DECISIONS ON WHETHER THE TERM "BRIBERY" IN THE TRAVEL ACT INCLUDES "COMMERCIAL BRIBERY" ARE INCONSISTENT AND REQUIRE CLARIFICATION BY THIS COURT

There is manifest disagreement among the Federal Courts as to whether the term "bribery" as used in the Travel Act includes "commercial bribery." Irreconcilable conflict is evident between the decision below, holding that the Travel Act may be extended to commercial bribery, and *United States* v. *Niedelman,* 356 F.Supp.

979 (S.D.N.Y. 1973) (*"Niedelman"*), set out in pertinent part in Appendix VI at pp. 15a-20a, *infra,* which held precisely to the contrary. In addition, Judge Bryan in this case reached a conclusion different from the one reached by Judge Lewis, who sits in the same Court, in the trial of the other Defendants named in this very Indictment. Likewise, there are summary decisions in the Southern District of New York which reached a conclusion contrary to that reached by Judge Whitman Knapp of that same Court in *Niedelman,* App. VI at p. 18a, *infra,* 356 F.Supp. at 981.[6]

There could hardly be a more conspicuous and compelling spectacle of confusion calling for clarification by this Court than contradictory results reached by Judges sitting in the very same Courts. Different Judges both in the Southern District of New York and the Eastern District of Virginia have accorded inconsistent treatment to defendants charged with essentially identical offenses. In terms of considered judicial opinions, there is now presented the head-on conflict between the decision below and *Niedelman.* This unseemly division among the Federal Courts will inevitably expand and deepen until this Court resolves the issue.

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[6] *United States* v. *Maiolo,* 72 Cr. 1123; *United States* v. *Endresen,* 73 Cr. 85; *United States* v. *Hohn,* 72 Cr. 1124; and *United States* v. *Callahan,* 72 Cr. 1126; all of which are unreported. Only in the *Callahan* case did the Court write an opinion and the pertinent portion of that opinion is set out in App. VII, p. 20a, *infra.*

II.

THE DECISION BELOW MISCONSTRUES AND IS IN CONFLICT WITH UNITED STATES v. NARDELLO, 393 U.S. 286 (1969)

Dramatically highlighting the necessity for this Court to speak is the fact that the decision below and the *Niedelman* decision both rely upon and proclaim allegiance to the strictures of this Court in *Nardello*. According to the Court below, the touchstone established in *Nardello* was whether the conduct alleged to be unlawful was generically similar to an unlawful activity named in the Travel Act; and, purporting to apply this test, the Court below held that commercial bribery (i.e., involving payments to private individuals) was sufficiently similar in kind to bribery of public officials that the Government might read and apply the Travel Act as though it included "commercial bribery". According to the *Niedelman* Court, the test laid down by this Court in *Nardello* was attuned to the purposes which Congress hoped to achieve in the Travel Act: "(1) to assist the states in fighting the depredations of the organized underworld [citations omitted]; and (2) insofar as possible, to achieve an interpretation having a uniform effect throughout the nation [citations omitted]." App. VI at p. 18a, *infra;* 356 F. Supp. at 981. Applying these twin tests upon which it held that *Nardello* rested and established for the Federal Courts to follow, the *Niedelman* Court concluded that "commercial bribery" could not properly be included within the term "bribery" as used by Congress in the Travel Act because (1) commercial bribery was never considered to be a typical tool of the underworld, in contrast to the traditional bribery of public officials; and (2) to include "commercial bribery" would be to create a lack of uniformity throughout the

nation, whereas in *Nardello,* because of the overlapping character of state statutes dealing with "blackmail" and "extortion," uniformity was achieved by ruling that "extortion" included blackmail by private individuals.[7] Relying upon the legislative history as a strong indicator of the Congressional intention, as this Court did in *Nardello, Niedelman* found that the legislative history of the Travel Act contains "not so much as a hint" that commercial bribery was to be included. App. VI at p. 19a, *infra,* 356 F.Supp. at 981.

In this conflict over how the instructions of this Court in *Nardello* are to be applied, the approach derived and followed by the *Niedelman* Court is plainly the more faithful. The Court below disregards the legislative history so extensively recited and relied upon by this Court in *Nardello,* particularly the contrast drawn by this Court between the terms "extortion" and "bribery" as used in the Travel Act. As this Court noted in *Nardello,* a principal Government argument was, "[s]ince Pennsylvania's extortion statute covers corrupt acts by public officials, the Government suggests that appellee's construction of 'extortion' renders the bribery prohibition superfluous." 393 U.S. at 293 n. 11. Manifestly, this Government position necessarily recognized that "bribery" in the Travel Act does not include bribery of private individuals, i.e., "commercial bribery."[8]

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[7] *Compare* the discussion of the State statutes dealing with extortion activities in *Nardello,* 393 U.S. at 294-295, *with* Note, *Control of Nongovernmental Corruption by Criminal Legislation,* 108 U. Pa. L. Rev. 848 (1960), which establishes that at about the time the Travel Act became law, only thirteen States had a general commercial bribery statute while seventeen others had statutes directed to payments made to particular types of employees. *Id.* at 849, 864, 866.

[8] "Furthermore, joined in the same clause with extortion is an

Moreover, this Court relied upon a letter written by Mr. Justice (then Deputy Attorney General) White which likewise demonstrated the contrast which the Government drew between the broad reach of "extortion" and the restricted one of "bribery" in the Act. The letter objected—successfully—that a proposed amendment, which would have limited the offenses specified in Subsection (b)(2) of the Travel Act, "extortion, bribery, or arson", to business enterprises involving the offenses specified in Subsection (b)(1), "eliminated from the purview of the bill extortions not related to the four above offenses [gambling, liquor, narcotics or prostitution] but which are, and have historically been, activities which involve organized crime. Such activities as the 'shakedown racket', 'shylocking' (where interest of 20% per week is charged and which is collected by means of force and violence, since in most states the loans are uncollectible in court) and labor extortion. It also removes from the purview of the bill *bribery of state, local and federal officials* by the organized criminals unless we can prove that the bribery is directly attributable to gambling, liquor, narcotics or prostitution." 393 U.S. at 292 n. 9 (emphasis is added throughout this Petition).

From the beginning, the intention was evident that the term "bribery" signified bribery of public officials; there was no suggestion that it could or would ever be extended to payments to private persons. In his ini-

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offense which has as its normal focus the corruption of public officers: interstate travel to promote 'bribery' is also forbidden. In this context, reading 'extortion' as confined only to acceptance of unauthorized fees by public officials, in states which retain that classification, would render the 'extortion' branch of the clause practically superfluous." *Brief for United States* in *Nardello*, 9.

tial testimony in support of the legislation, Attorney General Kennedy repeatedly specified "corruption of local officials" as one of the evils against which the proposed legislation was directed.[9]

This continued to be the thrust of the legislative history, as what ultimately became the Travel Act was proposed and explained to the Congress by the Department of Justice, as the Congress adopted it and intended it to be applied, and as this Court recognized in *Nardello.*

As the law then stood, bribery did not include payments to private persons, but was confined to the bribery of public officials. "Bribery has traditionally focused upon corrupt activities by public officials." *Nardello,* 393 U.S. at 293 n. 11. Consequently, the Department of Justice would have proposed expressly to include "commercial bribery", and Congress would have expressed "commercial bribery", had there in historical fact been any intention that the term "bribery" include payments to private persons.

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[9] "As has been pointed out so often, gambling, liquor violations, narcotics, *bribery, and corruption of local officials* and labor racketeering and extortion go hand in hand.

• • •

"Organized crime is nurtured by a number of activities, but the primary source of its growth is illicit gambling. From huge gambling profits flow the funds to bankroll the other illegal activities I have mentioned including the *bribery of local officials.*

"The main target of our bill is interstate travel to promote gambling. It also is aimed at the huge profits in the traffic in liquor, narcotics, prostitution as well as the use of these funds for *corrupting local officials* and for their use in racketeering in labor and management. Thus, when we speak of unlawful business it is business engaged in the aforementioned improper activities." *Hearings on S. 1653-1658, S. 1665 Before the Senate Committee on the Judiciary,* 87th Cong., 1st Sess. 2 (1961).

The decision below and the Indictment herein thus stand in disregard of the legislative history, the intention of Congress, and the decision of this Court in *Nardello*. To insure that the Travel Act is construed correctly and that *Nardello* is adhered to faithfully in this case and in all subsequent Travel Act cases, this Court should grant review of the decision below.

III.

THE DECISION OF THE COURT BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISION IN REWIS v. UNITED STATES, 401 U.S. 808 (1971).

In *Rewis* v. *United States*, 401 U.S. 808 (1971), this Court held that affirmative expression by Congress was essential to criminalize the conduct there alleged by the Government as sufficient to constitute a violation of the Travel Act. This Court relied upon the Congressional intention and the language of the statute, and was *"struck by what Congress did not say." Id.* at 811-812. Congress did *not* say *"commercial* bribery." [10]

This Court emphasized in *Rewis* as it had in *Nardello* that in the Travel Act Congress was aiming at those engaged in unlawful or illegal businesses for organized crime. 401 U.S. at 811 n. 6. As Attorney General Kennedy testified in introducing the legislation, "American citizens who are not connected with organized gambling and organized crime have nothing to fear. The only toes tread on here are those of racketeers and hoodlums." *Hearing on S. 1653-1658, S. 1665 Before the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. 17 (1961).

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[10] It likewise did *not* say *"payment"* in 18 U.S.C. § 215. See Part IV, p. 16, *infra*.

As earlier noted, there is not the slightest intimation in the Indictment that any of the Defendants in this case were engaged in any such conduct. The legal approaches which the Court below found necessary to embrace in order to reverse Judge Bryan's decision arresting judgment are thus out of step and sympathy not only with *Nardello,* but with *Rewis* as well.

Moreover, in *Rewis* this Court indicated a skeptical view as to whether Congress intended in the Travel Act to "transform relatively minor state offenses into federal felonies." *Rewis,* 401 U.S. at 812. The Court below has approved precisely such a transformation. While the New York commercial bribery statute cited in the Indictment creates a misdemeanor with a maximum penalty of only three months,[11] by encapsulating it within the Indictment charging a violation of the Travel Act its effect has been transformed into a felony, with a maximum penalty of five years.[12] Whether such a result comports with *Rewis* is a question which plainly merits the attention of this Court.

IV.

THE USE OF THE TRAVEL ACT TO EXPAND THE SCOPE AND PENALTY OF 18 U.S.C. § 215 ALSO MERITS CONSIDERATION BY THIS COURT

Stretching the boundaries of criminal conduct beyond those expressed and intended by the Congress in

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[11] Commercial Bribery is classified by New York as a Class B misdemeanor. Such misdemeanors carry a maximum term of imprisonment of three months. See p. 4, *supra.* New York has a "bribery" statute applicable only to bribery of "a *public* servant" (New York Penal Law § 200.00, p. 4, *supra*); and this statute is categorized as a Class D felony which carries a maximum term of imprisonment of seven years. *Ibid.*

[12] The sentence imposed upon the Defendant Piluso by Judge Lewis for his conviction under this Indictment was two years.

the Travel Act is reflected in this case not only by the enlargement of the term "bribery" to encompass the separate category of commercial bribery, but also by the expansion of the reach of 18 U.S.C. § 215 beyond any areas of conduct heretofore considered as falling within that statute.[13]

To begin with, 18 U.S.C. § 215 is not a "bribery" statute and any violation thereof thus cannot fall within the unlawful activity of "bribery" specified in the Travel Act. The crime of bribery is established in an entirely different provision of the Criminal Code, 18 U.S.C. § 201, which deals principally with bribery of public officials and includes bribery of witnesses in their official acts and duties. Further, the intention to influence official conduct is an expressed element of the crime of bribery as defined in § 201, but is not required for a violation of receipt by the bank officer, the offense established in 18 U.S.C. § 215. Section 215 is directed exclusively to benefits which a bank officer "by reason of his peculiar position of * * * influence or trust exacts from another." *Razette* v. *United States,* 199 F.2d 44, 48 (6th Cir.), *cert. denied,* 344 U.S. 904 (1952). Violations of such statutes are classified generically as "graft" rather than "bribery." *Ibid.*

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[13] Inasmuch as the Indictment inextricably melds both statutes, dismissal is required if *either* has been improperly invoked. As Judge Bryan plainly recognized, we cannot know whether the jury "came back on the right one or the wrong one, so if [any] of those is * * * improper * * *, then the conviction cannot be maintained." Transcript of proceedings in District Court, May 17, 1974. "[T]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates* v. *United States,* 354 U.S. 298, 312 (1957); *United States* v. *Johns,* 444 F.2d 58 (5th Cir. 1971).

Independent and apart from its manifestly unwarranted assumption that 18 U.S.C. § 215 was in fact a "bribery" statute, the Court below patently misapplied 18 U.S.C. § 215 in sustaining an Indictment which charged that it was violated by "*giving* the said Sidney M. Zneimer checks" and "the *paying* of commissions to an officer of a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, for procuring loans from said bank * * *." App. V at pp. 13a-14a, *infra*. The Court below did not attempt the impossible task of accommodating its conclusion to the legislative history, context or text, each of which demonstrates that 18 U.S.C. § 215 was knowingly restricted to *receipt* by a Congress fully aware that receipt and payment normally go hand in hand. The legislative history of the Federal Reserve Act of 1913, from which 18 U.S.C. § 215 is derived, reveals that this provision was aimed only at the bank officer. "In this section it is sought * * * to end the illegitimate practice whereby officers of national banks have heretofore profited at the expense of borrowers by charging a commission or brokerage for the obtaining of loans." House Rep. No. 69, 63rd Cong., 1st Sess. 72 (1913). Accordingly, in the statutory context of Chapter 11 of Title 18, § 217 in addition to § 215, prohibits only the receiving, § 224 prohibits only the giving, and §§ 201, 203, 209-214 and 216 prohibit both the giving and the receiving. Beyond doubt, Congress knew quite well what it was doing, and expressed precisely what it intended, when it outlawed only receiving in § 215. In complete harmony with this legislative history and context, the statutory text itself is unquestionably confined strictly to receipt; see pp. 4-5, *supra*.

Evidently the Government in its Indictment and the Court below in its consideration of this case recognized that the Petitioner, not being a bank officer and having given rather than having received a commission, could not be charged directly under 18 U.S.C. § 215. But as matters now stand, they have achieved by indirection what was thus plainly precluded by direction. Petitioner is being criminally charged for acts in this case which Congress has meticulously declined to characterize as criminal in 18 U.S.C. § 215. And the magic ingredient which has been utilized to accomplish this legal legerdemain is the Travel Act.

Such irrational jurisprudential acrobatics manifestly raise issues critical to the administration of the criminal laws and demand consideration by this Court. Could the Congress, which so carefully confined criminality to the recipient when it studied the subject directly, have intended that the payor be subjected to criminal liability merely because an additional statutory citation has been added to the indictment? Certainly there is no clear or convincing legislative history to this effect; and in the absence of such legislative history it would appear impermissible to import criminality into a substantive offense expressly not made criminal by the Congress through such a device as charging a violation of the Travel Act.[14] The entire Indictment is an unprecedented effort to extend the frontiers of criminality beyond the clear prescriptions and expressed intendments of Congress.

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[14] The references to conspiracy and to aiding and abetting in the Indictment do not alter this issue. The conspiracy charged is one to violate the Travel Act and the offenses which were charged as having been aided and abetted were likewise violations of the Travel Act.

This misuse of the Travel Act in this Indictment, sustained by the decision below, is further reflected in the anomaly which arises with respect to penalty. Congress has provided that the maximum penalty for violation of 18 U.S.C. § 215 is one year. By charging the violation of 18 U.S.C. § 215 as an unlawful activity under the Travel Act, rather than as an offense by itself, however, the prosecutors have here transformed a one year misdemeanor into a five year felony. There is certainly no indication that when Congress enacted the Travel Act, it intended that such gross distortions were to be visited upon its carefully structured statutory scheme.[15]

The kindest description of the Indictment and of the decision below sustaining it is that they are grounded upon ambiguities in the criminal laws. In such a case the decision below is not to be sanctioned for it cannot be accommodated with decisions of this Court. "In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)." *United*

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[15] Similar distortions would arise where the charge was one of conspiracy. While 18 U.S.C. § 371, the Federal conspiracy statute, contains a five-year penalty, it also provides that if the object of a conspiracy is a misdemeanor only, "the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." Consequently, if a defendant is charged with a conspiracy to violate 18 U.S.C. § 215, the maximum punishment would be one year, whereas if he were charged with conspiracy to violate the Travel Act, the maximum punishment would be five years.

States v. *Bass*, 404 U.S. 336, 347-348 (1971) ("Bass"). "[T]his being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity." *United States* v. *Enmons*, 410 U.S. 396, 411 (1973); *Bass*, 404 U.S. at 347, quoting *Rewis* 401 U.S. at 812. "In *Rewis*, we declined to accept an expansive interpretation of the Travel Act." *Bass*, 404 U.S. at 349. This Court should not permit the decision below, which imposes so blatantly expansive an interpretation of the Travel Act, to go unreviewed.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the Judgment and Opinion of the Fourth Circuit.

Respectfully submitted,

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